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Supreme Court of the United States

October Term, 1947.

No. 541.

FRANCIS JOSEPH GRYGER,
Petitioner,

vs.

C. J. BURKE, Warden, Eastern State Penitentiary,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Brief for the Respondent

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR THE RESPONDENT.

RESPONDENT'S STATEMENT OF THE CASE.

The petitioner has since 1927 been arrested eight times, and has either plead guilty or been convicted of every offense or groups of offenses. He was seventeen years of age in 1928 which now makes him thirty-seven. During that time he has spent 13 years and 9 months in jail between March 1927 to July 1943.

Statement of the Case

In 1943 he was arrested and plead guilty to twelve receiving stolen goods cases, and was tried and convicted of one burglary charge. While in the Eastern State Penitentiary he attempted to escape. On January 23, 1944 he plead guilty to prison breach and was given an extra one to two years.

Upon an Information filed and served on him on May 5, 1944, which came on for hearing in court on November 27, 1944, he stated that he was a fourth offender as charged in the Information.

The offenses which made him a fourth offender are as follows:

Arrest	Date of Trial	Charge	Place	Plea or Conviction	Bill #
	Mch 17, 1927	Burglary	Mary-land	Plead Guilty	
	Sentence: Maryland House of Correction for 1 year. Discharged Jan. 17, 1928.				
4-22-29	Apr. 23, 1929	Burglary	Phila., Pa.	Verdict Guilty	#1107
	Sentence: Huntingdon Reformatory Discharged September 20, 1930.				
11-26-30	Nov. 28, 1930	Armed Robbery,	Phila., Pa.	Plead Guilty	#1670
	Sentence: Eastern Penitentiary not less than five nor more than 10 years. Discharged May 28, 1936.				
4-26-37	Apr. 28, 1937	(Burglary) & R. S. G.	Phila.	Plead Guilty	R. S. G. #1046
	Sentence: Eastern Penitentiary not less than 1½ nor more than 3 yrs, at expiration of unexpired parole sentence imposed Nov. 28, 1930. Discharged April 29, 1943.				
6-23-43	Feb. 25, 1944	Burglary	Phila., Pa.	Verdict Guilty	#461
	Crime committed June 20, 1943.				

Statement of the Case

Sentence: Eastern Penitentiary not less than 5 nor more than 10 yrs. to be computed after expiration of present sentence.

Still confined.

He claims that on certain bills on which he was indicted as of July Sessions 1943, charging burglary and receiving stolen goods, that he was only guilty of receiving stolen goods. These bills are as follows:

No.	Place of Burglary	Date of Burglary	
251	6249 Mulberry St.	5-31-43	
252	6837 Horrocks St.	5-19-43	
253	6312 Jackson St.	5-1-43	
254	6301 Jackson St.	5-12-43	
255	6837 Kindred St.	5-15-43	Plead Guilty to Receiving Stolen Goods on all twelve bills.
256	3842 "K" St.	5-23-43	
257	430 W. Airdrie St.	5-24-43	
258	4405 Cottman St.	6-1-43	
259	951 Arrott St.	5-15-43	
260	2123 E. Auburn St.	5-19-43	
261	4048 Roosevelt Blvd.	5-5-43	
262	1641 E. Luzerne St.	6-1-43	

Sentence 251—252

July 26, 1943—2½ to 5 years E. P. 251

July 26, 1943—2½ to 5 years E. P. 252 after sentence on 251

These bills were found true by the Grand Jury on July 21, 1943 and on July 26, 1943 he plead guilty to the second count —receiving stolen goods and was sentenced the same day to two sentences of 2½ to 5 years to run consecutively on Bills 251 and 252 to be computed after the unexpired sentence on Bill 1046 of April Sessions 1937 which sentence of 18 months to 3 years imposed April 28, 1937 was to begin at the expiration of the unexpired parole on sentence on Bill

1679 of November Sessions 1930 on which the defendant was sentenced on November 28, 1930 to not less than five nor more than ten years.

The crime of receiving stolen goods is not one of the crimes which would cause a person to be a fourth offender, but the time spent in jail on such sentences, tolls the running of the five year period.

After the conviction of the petitioner on February 25, 1944 on Bill 461 of June Sessions 1943 for burglary, he became a fourth offender, and thereafter the Information that he was a fourth offender was filed and served.

SUMMARY OF ARGUMENT.

I.

Habeas Corpus is the proper remedy to test the legality of a commitment.

II.

The Fourth Offender Act of Pennsylvania provides for life imprisonment after the fourth conviction of named crimes:—all heinous. Many felonies do subject the convict to be punished as a fourth offender with a life sentence.

Each conviction must be had within five years after release from prison for the prior conviction.

After four such convictions, the District Attorney must file an information setting fourth the four convictions, serve a copy on the convict 30 days prior to taking further proceedings in court.

In court, if the convict admits his identity as the fourth

offender or is found to be a fourth offender by a jury, after denial or silence, his last sentence shall be revoked and he shall be sentenced to life imprisonment.

III.

Due Process of law does not require that counsel be assigned. When the convict admits his identity as a fourth offender there is no need to appoint counsel.

IV.

Habitual Criminal laws such as the Fourth Offender Act of Pennsylvania are not ex post facto laws. They do not punish again former crimes, but for the last crime give a more severe penalty because of prior conviction.

V.

The sentence imposed on the last conviction is revoked and the life penalty imposed. Convictions prior to the last conviction are still in force. R. 13.

ARGUMENT.

I.

It is admitted that Habeas Corpus is the proper remedy to test the legality of a commitment, however our contention is, and always has been, that the petitioner is properly sentenced for life as a result of the conviction of three burglaries

and one robbery; each new conviction happening shortly after he was paroled on a former conviction.

II.

In Pennsylvania, a person to be guilty as a fourth offender does not have to be guilty only of committing a felony as is the case in most States. The crimes of which one has to be convicted in Pennsylvania are serious, namely:

> "* * * treason, murder, voluntary manslaughter, sodomy, buggery, burglary, entering with intent to steal, robbery, arson, mayhem, kidnapping, sale of narcotics, perjury, abortion, pandering, incest, or any offense committed or attempted to be committed through the instrumentality of or with the aid of a deadly weapon or gunpowder or other explosive substance or corrosive fluid * * *."
>
> Act of June 24, 1939, §1108, P. L. 872,—18 P. S. §5108.

Therefore, receiving stolen goods, which is a felony in Pennsylvania, is not an offense which can be counted as one of the crimes which would make him a fourth offender.

There is this provision of the Fourth Offender Act of the Commonwealth of Pennsylvania:

> "* * * it shall be the duty of the district attorney of the county in which the last conviction was had to file a complaint accusing the said person of such previous convictions and to serve a copy of such information upon the defendant thirty (30) days before taking any further proceedings in court as hereinafter set forth. * * *"
>
> Act of June 24, 1939, §1108, P. L. 872,—18 P. S. §5108.

which to us seems to be most fair to a convict. It means that there cannot be tacked on to the indictment for the fourth crime for which he is about to be tried any reference to prior convictions. Only after he has been four times convicted of the named crimes is it then proper, to move, upon proof that he is a fourth offender, that his last sentence be revoked, and that he be sentenced to life imprisonment. Giving to the convict thirty days time after the filing of such an Information before it may be heard in court, gives him ample time to obtain counsel if he so desires. In this case the petitioner was served with the Information on May 5, 1944 and was not brought before the Court until November 27, 1944 which gave him more than six months to obtain counsel. Also, he was not without the knowledge that he could obtain counsel because his fourth conviction was on Bills 461 for burglary in premises of Raymond Wilde, and 462 for aggravated assault and battery on Harry Hass, not in the premises of Raymond Wilde. He plead not guilty to those bills of indictment and was represented by counsel, Philip Werner, Esquire. R. 61.

How the Petitioner Plead.

In Maryland in 1927, the petitioner plead guilty.

In Philadelphia in 1929 he plead not guilty and was convicted.

In Philadelphia in 1930 he plead guilty.

In Philadelphia in 1937, although he was indicted for burglary and receiving stolen goods, he plead guilty only to receiving stolen goods. Had counsel.

In Philadelphia in 1943, to twelve bills of indictment charging burglary and receiving stolen goods, he plead guilty only to receiving stolen goods.

In Philadelphia, in 1943, having plead not guilty to burglary and receiving stolen goods, he was convicted of burglary and receiving stolen goods. Had counsel.

Argument

The petitioner states that at the time he was sentenced on Bills Nos. 251-262 inclusive of July Sessions 1943 to which he had on that day plead guilty, he was tried on Bills Nos. 461 and 462 June Sessions 1943 to which he had on June 28, 1943 plead not guilty. This is, of course, not true. No jury was empaneled and he was not tried. These two bills of indictment were continued. There could not have been a fair trial on that day because a panel of jurors is drawn for each criminal court room and sits in the court room during all proceedings of pleas or trial. To have called a jury of twelve from that panel and to have tried the petitioner on bills 461 and 462 after he had plead guilty to twelve bills charging receiving stolen goods would be unjust. It may not be done and was not done. These cases were continued. He was tried a few months later before an entirely new panel who knew nothing about his prior record.

The petitioner sets forth in the petition for habeas corpus R. 29 that at the time he was sentenced on "Bills 251-252 inclusive, July 1933 he was also sentenced on Bill 461 as the notes of testimony taken at this hearing, pages 1 to 13 inclusive, clearly show." We can find no substantiation of this claim whatsoever. The records of the Clerk of Court do not disclose that any notes of testimony were taken and transcribed and filed of record. Notes of testimony do not have to be taken in criminal cases, and in pleas of guilty generally are not.

The petitioner states as another fact that immediately after the petitioner was sentenced he started to appeal, but the prison authorities refused to release funds for the purpose. R. 30. This is a bald statement, but a careful reading of the record shows that this statement is error. The Board of Trustees on December 20, 1945 wrote to the District Attorney in reference to releasing funds from the Prisoner's Welfare Fund for the use of this petitioner. This letter was answered by the District Attorney the next day December 21, 1945 which was one year after he was sentenced to life imprisonment.

Argument

Our Act provides that a sentence of a Fourth offender is reviewable by appeal to Supreme or Superior Court and makes provision for employment of counsel. An appeal must be taken, however, in 45 days and no such appeal was taken. There is no date given as to when the petitioner first tried to take an appeal or get the matter before the upper Court except the fact that in September of 1945, ten months after he was sentenced to life imprisonment, he filed a petition for writ of habeas corpus in the Supreme Court of Pennsylvania, he thereafter filed one with the Superior Court of Pennsylvania; and thereafter filed another one in the Supreme Court of Pennsylvania, and a fourth, in the United States District Court for the Eastern District of Pennsylvania. In all four petitions he reiterates the same allegations. In none does he deny that he is the person convicted of the four crimes set forth in the information which causes him to be a fourth offender.

The argument is made (Brief, p. 31) that on July 26, 1943 when the petitioner plead guilty to receiving stolen goods on bills of indictment Nos. 251 to 262, inclusive, of July Sessions, 1943, and was sentenced, that he was then awaiting sentence on indictments Nos. 1046 and 1047 of April Sessions, 1937, to which he had plead not guilty. This is untrue (R. 56). First, he plead guilty to receiving stolen goods, on bills 1046 and 1047 and was sentenced on April 28, 1937 to eighteen months to three years more than six (6) years before indictments Nos. 251-262, inclusive, were found July 21, 1943 by the Grand Jury. He did have one and one-half years back parole time to serve without commutation because of his conviction (plea) on bills 251 to 262, inclusive. That became automatic, and is not a new sentence. It is the balance of his maximum.

Act of June 19, 1911, P. L. 1055, Sec. 10 as amended June 22, 1931, P. L. 862—61 P. S. 305.

His only contention is that he did not have counsel.

III.

Due Process of Law.

Article I, Section 9 of the Constitution of Pennsylvania provides:

"Rights of accused in criminal prosecutions.

"In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, * * *"

Article VI of the Amendments of the Constitution of the United States provides:

"Rights of accused persons in criminal prosecutions.

"In all criminal prosecutions, the accused * * * shall have * * * the Assistance of Counsel for his defence."

Article XIV of the Amendments of the Constitution of the United States provides:

"Section 1. Citizenship defined. Privileges of citizens.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Article VI of the Amendments to the Constitution of the United States applies only to trials in federal courts.

Betts v. Brady, 316 U. S. 455, 461.

That the "Accused should have a right to be heard by himself and by his counsel was adopted by Pa. in 1776 * * *"

Betts v. Brady, supra, 465.

In most states the people, their representatives and courts, do not consider the appointment of counsel a fundamental right essential to a fair trial.

Betts v. Brady, supra, 471.

Argument

In Pennsylvania, by Act of Legislature, in murder cases—the only instance carrying the death penalty—counsel must be appointed.

Act March 22, 1907, P. L. 31—19 P. S. 784.

In crimes other than murder, accused has a right to be heard by counsel, but it has never been the law that he must be supplied with counsel.

Commonwealth ex rel. McGlinn v. Smith, 344 Pa. 41.

McGlinn plead not guilty to charge of armed robbery.

Affirmed *Commonwealth ex rel. Withers v. Ashe*, 350 Pa. 493, 495;
Commonwealth ex rel. Fitts v. Smith, 158 Pa. Super. 105.

It has been constantly held that when a defendant pleads guilty there is no need for the court to appoint counsel to represent him.

Com. ex rel. Curtis v. Ashe, 139 Pa. Super. 417;
Com. ex rel. Cook v. Ashe, 144 Pa. Super. 1;
Com. ex rel. Billings v. Ashe, 144 Pa. Super. 209, 211;
Com. ex rel. Shaw v. Smith, 147 Pa. Super. 423;
Com. ex rel. Uveges v. Ashe, 161 Pa. Super. 58, 61, 62.

The petitioner had six months in which to get counsel. He had counsel when he was tried on Bills 461 and 462 of June Sessions 1943 namely, Philip Werner, Esquire. (R. 61.) He had counsel when he was tried on Bill 1046, April Sessions, 1937,—Thomas E. Cogan, Esquire, Defender, of Philadelphia Voluntary Defender Association. He could easily have gotten in communication with either of these

men or any other counsel he desired. In these six months he did not get counsel. He said he was a fourth offender and he does not now deny it.

IV.

Ex Post Facto.

The fourth offender acts are not ex post facto because they punish none but future crimes, and affect alike all persons similarly situated. It therefore makes no difference whether a crime is committed prior to the passage of a fourth offender act or after. The person is being punished because of the last act which makes him a fourth offender.

Graham v. West Virginia, 224 U. S. 616, decides that when a convict has been twice sent to the penitentiary there may be an information filed in the County where the penitentiary is located (not where he is tried) setting forth that he is a second offender and that he shall be confined to the penitentiary for life. The trial in a county other than that in which he was originally tried, is proper. It has long been the recognized policy in England and this country to inflict severer punishment upon old offenders. "They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." p. 626:

> "Nor is there any reason why such a proceeding should not be prosecuted upon an information presented by a competent public officer on his oath of his office. There is no occasion for an indictment. To repeat, the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction. And it cannot be

contended, that in proceeding by information instead of by indictment there is any violation of the requirement of due process of law. Hurtado v. California, 110 U. S. 516; Brown v. New Jersey, 175 U. S. 172, 175; Maxwell v. Dow, 176 U. S. 581, 584."

Moore v. Missouri, 159 U. S. 673;
McDonald v. Massachusetts, 180 U. S. 311;
People v. Gowasky, 244 N. Y. 451;
People ex rel. Fernandez v. Kaiser, 230 App. Div. 646. Affirmed 256 N. Y. 581. Certiorari denied 284 U. S. 631;
Cross v. State, 96 Fla. 768, 781.

V.

Imposition of Life Sentence.

The Fourth Offender Act provides:

"* * * and shall vacate any previous sentence notwithstanding that the term of court in which the last sentence was imposed may have expired."

This undoubtedly refers to vacating the last sentence only. This leave the sentence on Bill 1046 of April Sessions, 1937, sentences on Bills 251 and 252 of July Sessions 1943, and a sentence for prison breach of one to two years, to be served prior to beginning the sentence of life imprisonment on Bill 461 of June Sessions 1943. These three prior sentences having a minimum totaling seven and one-half (7½) years will not expire until January 26, 1951.

CONCLUSION.

The argument is made that petitioner is a petty thief. This argument is surprising, to say the least. If burglary is a petty crime, it is new to us. The petitioner was indicted on bills Nos. 251 to 262 charged with burglary and receiving stolen goods. There are no notes of testimony, but twelve houses were broken into and goods stolen. Those burglaries all happened between May 1, 1943 and June 1, 1943 (a period of a month). The petitioner plead guilty to those indictments, and that plea was accepted by the court because the penalty which could have been meted out to him on the plea of receiving stolen goods was more than the court did impose, or would have imposed, had he plead guilty to the burglaries.

The petitioner plead guilty to receiving the goods stolen from those twelve homes. Who burglarized those homes? Well, we do not know. At least the petitioner knows and, perhaps, he was the burglar. He undoubtedly knows the difference between the penalties for burglary and receiving stolen goods. If he had a chance to avoid the penalty for burglary, he took it.

The "cleverness" of the criminal in his war against society is shown by the history of this petitioner from 1927 to 1943. His petitions for habeas corpus quote the law from Corpus Juris Secundum, the decisions of the United States, Pennsylvania and Illinois.

The petitioner is a fourth offender under the laws of the Commonwealth of Pennsylvania. He has committed many crimes. He has shown no tendency to reform. On the contrary, he was no more than out of jail, even on parole, when he went back to his life of crime. He is a fourth offender. He admits that he is a fourth offender, and under the laws of Pennsylvania, having admitted his guilt, there was no need to assign or appoint counsel for him. He has, as habitual criminals always do, filed a number of petitions

for Habeas Corpus. In addition to the petition filed May 15, 1947 he filed a petition with the Supreme Court of Pennsylvania in September 1945. He filed a similar petition in the Superior Court of Pennsylvania in December 1945. He filed a similar petition with the Supreme Court of Pennsylvania March 21, 1947. He filed a similar petition with the United States District Court for the Eastern District of Pennsylvania; all of which were dismissed.

This also should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 541.—October Term, 1947.

Francis Joseph Gryger, Petitioner, *v.* C. J. Burke, Warden, Eastern State Penitentiary.	On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

[June 14, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

The Commonwealth of Pennsylvania holds the petitioner prisoner under a life sentence as an habitual criminal. His claim here, protesting denial by the State Supreme Court of his petition for a writ of *habeas corpus*, is that the Federal Constitution requires Pennsylvania to release him on due process of law grounds because (1) he was sentenced as a life offender without counsel or offer of counsel; (2) one of the convictions on which the sentence is based occurred before the enactment of the Pennsylvania Habitual Criminal Act [1] and the statute is therefore unconstitutionally retroactive and *ex post facto*; and (3) sentencing under this Act unconstitutionally subjects him to double jeopardy.

At the outset, we face the suggestion that the case cannot properly be decided on the merits by this Court because, as a matter of state law, the attack on the life sentence may be premature since petitioner would be validly restrained on prior sentences not expiring until at least February 1949, even if the life sentence were to be invalidated. Some members of the Court prefer to affirm the judgment on that ground. However, since

[1] § 1108 of the Penal Code of 1939, 18 Pa. Stat. Ann. § 5108.

the state law question is not free from difficulty, the issue was not fully litigated in this Court, and since, on the merits,[2] the same conclusion is reached, we dispose of the case in that manner.

Beginning in 1927, at the age of seventeen, this petitioner has been arrested eight times for crimes of violence, followed in each instance by plea of guilty or by conviction. Respondent states, and petitioner does not deny, that of the last 20 years of his life, over 13 years have been spent in jail. A schedule of his pleas or convictions and pertinent data is appended, those in italics being the four on the basis of which an information was filed charging him to be a fourth offender. Brought into court on that limited charge, he acknowledged his identity as the convict in each of the previous cases and he was given a life sentence pursuant to the Act. He was without counsel and it is said that he was neither advised of his right to obtain counsel nor was counsel offered to him.[3]

It rather overstrains our credulity to believe that one who had been a defendant eight times and for whom counsel had twice waged defenses, albeit unsuccessful ones, did not know of his right to engage counsel. No request to do so appears. The only question of fact before the court on the fourth offender charge was whether he was

[2] Respondent contested the case below and in this Court on the merits. We assume that the Supreme Court of Pennsylvania passed on petitioner's allegations of deprivation of federal constitutional rights and that those issues are therefore open here. *Herndon* v. *Lowry*, 301 U. S. 242, 247.

[3] The Supreme Court of Pennsylvania has frequently held that the state constitutional provision according defendants the right to be heard by counsel does not require appointment of counsel in non-capital cases. See, for example, *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41; *Commonwealth ex rel. Withers* v. *Ashe*, 350 Pa. 493. See also *Betts* v. *Brady*, 316 U. S. 455, 465. The Pennsylvania statutes require only that destitute defendants accused of murder shall be assigned counsel. Act of March 22, 1907, 19 Pa. Stat. Ann. § 784.

the same person who was convicted in the four cases. This he then admitted and does not now deny. The only other question was sentence, and it does not appear that any information helpful to petitioner was unknown to the court.

It is said that the sentencing judge prejudiced the defendant by a mistake in construing the Pennsylvania Habitual Criminal Act in that he regarded as mandatory a sentence which is discretionary. It is neither clear that the sentencing court so construed the statute, nor if he did that we are empowered to pronounce it an error of Pennsylvania law. It is clear that the trial court, in view of defendant's long criminal record, considered he had a duty to impose the life sentence and referred to it as one "required by the Act." But there is nothing to indicate that he felt constrained to impose the penalty except as the facts before him warranted it. And it in any event is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

We have just considered at length the obligation of the States to provide counsel to defendants who plead guilty to non-capital offenses. *Bute* v. *Illinois*, 333 U. S. 640. Notwithstanding the resourceful argument of assigned counsel in this Court, we think that precedent settles the

issue here, that no exceptional circumstances are present and that, under the circumstances disclosed by the record before us, the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid.

Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Cf. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; *Carlesi* v. *New York*, 233 U. S. 51; *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51.

The judgment is

Affirmed.

Table of Pleas and Convictions.

Date	Charge	Plea	Sentence
1927	*Burglary*	*Guilty*	*1 year.*
1928	Assault and battery; carrying concealed deadly weapon.	Guilty	1 year.
1929	*Burglary; breaking and entering with intent to commit a felony.*	*Not guilty*	*Committed to Reformatory indefinitely.*
1930	*Armed robbery, armed assault, entering with intent to rob.*	*Guilty*	*5 to 10 years.*
1937	Burglary, carrying concealed deadly weapon.	Guilty of receiving stolen goods, and carrying concealed deadly weapon.	1½ to 3 years.
1943	Burglary, receiving stolen goods—12 offenses each.	Guilty of receiving stolen goods.	5 to 10 years.
1944	*Burglary*	*Not guilty*	*5 to 10 years.*
1944	Aggravated assault and battery.	Not guilty	Suspended.

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[June 14, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy join, dissenting.

Even upon the narrow view to which a majority of this Court adhere concerning the scope of the right to counsel in criminal cases, as guaranteed by the Fourteenth Amendment's requirement of due process of law, I cannot square the decision in this case with that made in *Townsend* v. *Burke*, No. 542, decided today.

The opinion in that case declares that "the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process." In this view the Court finds that Townsend was prejudiced by the trial court's action in sentencing him on the basis either of misinformation submitted to it concerning his prior criminal record or by its misreading of the record and carelessness in that respect. On the same basis Gryger's sentence was invalid, although the Court finds no such exceptional circumstances here inducing prejudice as it finds in Townsend's case.

The record, in my judgment, does reveal such a circumstance, one working to induce prejudice at exactly the same point as with Townsend, namely, upon the critical question of sentence. So far as the record reveals, Gryger was sentenced to life imprisonment by a court working under the misconception that a life term was

mandatory, not discretionary, under the Pennsylvania Habitual Criminal Act.[1]

Exactly the opposite is true. In explicit terms the statute puts imposition of life imprisonment upon fourth offenders "in the discretion of the judge."[2] Moreover, appeal of the sentence is authorized "not only as to alleged legal errors but also as to the justice thereof," with the costs of appeal and reasonable counsel fee to be paid by the Commonwealth.[3]

In spite of his discretion and duty to exercise it, the sentencing judge, remarking that the only question was whether petitioner was the same person who had suffered the prior convictions, repeatedly spoke as if the life sentence were mandatory. The statements quoted in the margin are typical.[4]

It is immaterial that the same sentence might or probably would have been imposed in an exercise of the court's discretion. Petitioner was entitled to have sentence pro-

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[1] Pa. Stat. Ann. tit. 18, § 5108.

[2] Section 5108 (b) provides that when the prior convictions are shown at the trial for the fourth offense, the defendant "shall, upon conviction . . . be sentenced, in the discretion of the judge trying the case, to imprisonment in a state penitentiary for the term of his natural life."

Section 5108 (d), which authorizes the procedure followed in the instant case, *viz.* a separate proceeding on an information within two years of the fourth conviction, provides that "the court may sentence him to imprisonment for life as prescribed in clause (b) of this section . . . ."

That the statute vests discretion in the sentencing judge has been clearly recognized by the Commonwealth's highest court. *Commonwealth ex rel. Foster* v. *Ashe*, 336 Pa. 238, 240.

[3] § 5108 (d).

[4] ". . . it becomes my duty under the Act of Assembly, to treat such a case, that is to say, where a person has been found guilty the fourth time of a felony within a prescribed period, to impose the sentence required by the Act."

"In other words, the law has come to this viewpoint: . . . [a fourth offender] must be removed from the possibility of ever committing the offense again."

nounced in that manner, not as an automatic mandate of statute. The denial of the very essence of the judicial process, which is the exercise of discretion where discretion is required, is in itself a denial of due process, not merely an error of state law of no concern to this Court. And we cannot speculate whether the same sentence would have been pronounced if the court's discretion had been exercised.

Moreover, the court's misconception, together with the absence of counsel, deprived the petitioner of any chance to be heard on the crucial question of sentence, the only matter left for hearing and the vital one after his plea of guilty was received. Even if it could be assumed, as the Court says, that he knew of his right to counsel from his frequent prior appearances in court,[5] still it cannot be assumed, indeed the record substantially disproves, that he knew the exact terms of the Habitual Criminal Act.[6]

[5] A dubious assumption, it would seem, in view of the fact that Pennsylvania generally confines the right to have counsel in criminal trials to capital cases. See, *e. g.*, *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41; *Commonwealth ex rel. Withers* v. *Ashe*, 350 Pa. 493. Pa. Stat. Ann. tit. 19, § 784. But cf. note 3 and text.

[6] Petitioner, when served with the information charging him as a fourth offender, was confined in the penitentiary without financial means of preparing a defense. He alleged, without contradiction, that the prison authorities refused his request for a copy of the Habitual Criminal Act. It is no answer, of course, to say that petitioner had no need of the statute or other assistance because of his previous trips through the courts. Whatever knowledge of court procedures he may have acquired, he was unfamiliar with the fourth offender act.

Even if petitioner had secured access prior to the hearing to materials needed to prepare a defense, or had been adequately informed by the court as to the statute's terms and his rights thereunder, it is highly unrealistic to assume that petitioner was capable of adequately presenting his own case at the hearing. The pleadings which he filed are telling witness of his limited intelligence and education. And at the hearing it was so obvious that petitioner was unable to comprehend the issues involved that the assistant district attorney representing the Commonwealth remarked, "He doesn't understand."

He therefore, misled it would seem by the court's language giving no hint of its discretionary power, made no plea in mitigation and had no representative to correct the court's misconception or present considerations which might have induced a sentence less severe than the one pronounced. To paraphrase the concluding sentence of the opinion in the *Townsend* case, "Counsel might not have changed the sentence, but he could have taken steps to see that the sentence was not predicated on misconception or misreading of the controlling statute, a requirement of fair play which absence of counsel withheld from this prisoner."

I find it difficult to comprehend that the court's misreading or misinformation concerning the facts of record vital to the proper exercise of the sentencing function is prejudicial and deprives the defendant of due process of law, but its misreading or misconception of the controlling statute, in a matter so vital as imposing mandatory sentence or exercising discretion concerning it, has no such effect. Perhaps the difference serves only to illustrate how capricious are the results when the right to counsel is made to depend not upon the mandate of the Constitution, but upon the vagaries of whether judges, the same or different, will regard this incident or that in the course of particular criminal proceedings as prejudicial.